

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-1457**

LLOYD WOOD CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

OLIN W. ZEANAH
WILBOR J. HUST, JR.
P.O. Box 2490
Tuscaloosa, Alabama 35401

Counsel for Petitioner

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**PETITION FOR WRIT OF CERTIORARI TO
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Lloyd Wood Construction Company, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on November 11, 1977, and the judgment denying the motion for rehearing on January 13, 1978.

CITATIONS TO OPINIONS BELOW

The order of the Court of Claims granting defendant's motion to dismiss and the order overruling the motion for rehearing is not yet published and is printed in Appendix B hereto, *infra*, pp. 1b-5b.

JURISDICTION

The judgment of the Court of Claims was entered on November 11, 1977, p. 1b *infra*. Rehearing was denied on January 13, 1978, p. 6b *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255 (1).

QUESTIONS PRESENTED

1. Whether the Administrator for Federal Procurement Policy can issue and the appropriate contracting officer can apply a guideline that is more restrictive than and not authorized by the Small Business Emergency Relief Act to deny compensation to an otherwise qualified small business under the Act.
2. Whether the Small Business Emergency Relief Act is purely discretionary as held by the Court of Claims in dismissing the Petition below.
3. Whether the Court of Claims was correct in granting a motion to dismiss the Petition below when the exhibits to the Petition and the allegations in the Petition revealed that the Contracting Officer and Reviewing Officer misinterpreted the Act in denying Petitioner's claim for compensation.

STATUTE INVOLVED

The statute involved in the Small Business Emergency Relief Act, Pub. L. 94-190, 89 Stat. 1095 (1975). It is printed in Appendix A, *infra*, pp. 1a-3a.

STATEMENT

On August 25, 1972, while the wage-price freeze was in effect, Petitioner, a small business, was awarded a contract by the U.S. Army Corps of Engineers to design and construct 300 units of family housing at Ft. Jackson, South Carolina. The amount of the contract was \$5,383,164.00.

During construction the wage-price freeze was lifted and prices increased dramatically on materials and services, Petitioner was obligated to supply and perform under its contract. The Petitioner suffered serious financial loss due to the significant unanticipated cost increases directly affecting the cost of contract compliance and the conditions which caused these increases were experienced generally by other small business concerns at the same time and were not the result of negligence, underbidding, or other special management factors peculiar to Petitioner. As a result of the dramatic increases in costs and prices, Petitioner incurred costs of \$6,831,272.76 under this contract. Therefore, as of December 31, 1975, Petitioner had suffered a total loss under said contract of \$911,342.65.

On December 31, 1975, Congress passed the Small Business Emergency Relief Act for the express purpose of providing relief from rapid escalation of costs and the resulting losses suffered by small businesses in connection with fixed-price government contracts entered into between August 15, 1971, and October 31, 1974.

Petitioner requested relief under this Act on February 16, 1976, with the Contracting Officer who declined to review the same on February 21, 1976, because the implementing regulations had not been received. On January 9, 1976, the Administrator for Federal Procurement Policy issued the

guidelines to implement the Act. These guidelines are printed in Appendix C, *infra*, pp. 1c-4c, and provided in part as follows:

Relief should be limited to those small business firms whose overall financial position is so poor that their ability to survive, without relief under the Act, is in question.

On June 28, 1976, the Contracting Officer denied the requested relief based in part on the above-quoted portion of the guidelines. This decision is printed in Appendix D, *infra*, p. 1d. The Acting Division Engineer reviewed this matter, and on September 24, 1976, he affirmed the denial of the claim. He stated that the Act did not permit reimbursement for losses already incurred. This decision is printed in Appendix E, *infra*, pp. 1e-2e.

A petition was then filed in the Court of Claims for relief under this Act. The Court of Claims granted the government's motion to dismiss holding that the Act created no entitlement to relief. The Court of Claims held that there could be no relief unless Petitioner met the guidelines of the Office of Federal Procurement Policy and further that the Act was purely discretionary. The court further noted that Petitioner had "pledged nothing" to show that the Contracting Officer's determination was illegal because it was arbitrary, capricious, or violated an act or regulation.

REASONS FOR GRANTING THE WRIT

1. This Act was newly created to deal with a specific problem and, therefore, the decision of the Court of Claims is one of first impression. However, the principles relied upon

by the Court of Claims in dismissing the Petition do conflict with the prior decisions of this Court and it conflicts with the scope of the Act because the Petitioner is exactly the entity for whom the Act was passed. The action of the Court of Claims has left Petitioner without a remedy.

2. The first reason given by the Court of Claims in determining that the statute did not create any entitlement to relief was that the Petitioner could not show it fell within the applicable guidelines. Petitioner claims that the guidelines are void and the decision of the contracting officer — relying on these guidelines — was illegal.

The Act provided that the Office of Federal Procurement Policy was to issue "cost comparison and compensation" guidelines.¹ The Act does *not* restrict compensation to those firms whose ability to survive is in question as do the guidelines.² Therefore, the guidelines are contrary to and more limited than the Act itself. This is not permissible.³ The denial of the claim on this basis certainly should provide jurisdiction for review by the Court of Claims. The basic and fundamental principle of the doctrine of separation of powers has been violated in this case.

3. Petitioner contends that the Act is not "purely discretionary" as was held by the Court of Claims. To hold otherwise leaves Petitioner with no relief even though it has suffered a loss in excess of \$900,000.00 and in spite of the fact that Congress passed the Act with its express purpose being that of compensation for Petitioner and others

¹Sec. 4 (b) (2) of Act, Appendix A.

²Sec. 2, Appendix C.

³*Campbell v. Galeno Chemical Co.*, 281 U.S. 599 (1930); *National Life and Accident Co. v. United States*, 524 F.2d 559 (6th Cir. 1975); *Freeman v. Morton*, 499 F.2d 494 (D.C. Cir. 1974).

similarly situated. In an analogous situation the Court of Claims was held otherwise. After the passage of the War Contract Hardship Claims Act, 41 U.S.C. 106, also known as the Lucas Act, the Court of Claims stated:

As we see it, the Lucas Act is more in the nature of an Act of Congressional generosity rather than of strict equity. It makes a legal obligation out of what was regarded as a moral one, and if its pre-requisites are satisfied, the obligation, exists.⁴

Certainly, Congress recognized the obligation in this instance; the obligation exists, just as it did under the Lucas Act. The Petitioner fits the criteria and the Court of Claims should exercise jurisdiction over this claim.

4. The Army Officers based their denial of this claim upon the guidelines that are illegal as noted above⁵ and upon the premise that the Act did not allow compensation for losses already incurred.⁶ The Act itself clearly allows recovery for losses firms have suffered. Such language is constant throughout the Act. In fact, the decision of the Court of Claims implicitly recognizes the authority to grant Petitioner's claim. It has long been the law that when a claim is founded upon a "misinterpretation or misapplication of an Act of Congress" that the Court of Claims does have jurisdiction.⁷

All of the decisions of the contracting officers were attached to the amended Petition in the Court of Claims. In Count Two of the amended Petition, Petitioner averred that

⁴Warner Construction Co. v. United States, 115 F. Supp. 465 (Ct. Cl. 1953).

⁵See Appendix D.

⁶See Appendix E.

⁷Eversharp v. United States, 125 F. Supp. 244, 246 (Ct. Cl. 1954).

the Respondent, in failing to "properly interpret and apply said Act as shown on Exhibits A, B, and C, attached hereto, has breached its obligations to the Petitioner." Count Two goes on to characterize this as a breach of contract, but the notice requirement of Federal Pleading was satisfied. The claim is valid because the officers did rely on void regulations and did, in part, misinterpret the Act.

Therefore, even if the Act is "purely discretionary" the Court of Claims erred in finding that Petitioner had failed to show that the contracting officers' decision violated the applicable statute.⁸ This claim should be decided on the merits, and should not have been summarily dismissed by the Court of Claims.

Finally, if the Court of Claims was correct in holding that the Act was purely discretionary then it is clear that the Petition has been placed in an impossible situation. The Contracting Officer and Reviewing Officer denied the claim under the erroneous impression that they had no authority to grant relief. Their ability to grant relief was terminated by the Act on September 30, 1976.⁹ The Court of Claims held that the Army did have the power but since it was discretionary there could be no review. Since the Army failed to recognize its authority under the Act, the Court of Claims should review this matter and allow the claim.

⁸See, Decision of Court of Claims, Appendix B.

⁹Sec. 6 (b) of Act, Appendix A.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

OLIN W. ZEANAH
WILBOR J. HUST, JR.

Counsel for Petitioner

APPENDIX A

Public Law 94-190
94th Congress, H. R. 5541
December 31, 1975

An Act

To provide for emergency relief for small business concerns in connection with fixed-price Government contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Small
Business
Emergency
Relief
Act.

SHORT TITLE

Section 1. This act may be cited as the "Small Business Emergency Relief Act".

41 USC 252
note

POLICY

Sec. 2. It is the policy of Congress to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns have suffered or can be expected to suffer serious financial loss because of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

41 USC 252
note

89 STAT. 1095

DEFINITIONS

Sec. 3. As used in this Act—

(1) the term "executive agency" means that an executive department, a military department, and an independent establishment within the meaning of sections 101, 102, and 104(1) respectively, of title 5, United States Code, and also a wholly owned Government corporation within the meaning of section 101 of the Government Corporation Control Act; and

(2) the term "small business concern" means any concern which falls under the size limitations of the "Small Business Administrator's Definitions of Small Business for Government Procurement."

AUTHORITY

Sec. 4. (a) Pursuant to an application by a small business concern, the head of any executive agency may terminate for the convenience of the Government any fixed-price contract between that agency and such small business concern, upon a finding that—

(1) during the performance of the contract, the concern has suffered or can be expected to suffer serious financial loss due to significant unanticipated cost increases directly affecting the cost of contract compliance; and

41 USC 252
note.

31 USC 846.

Fixed price
contracts,
termination.
Application.

41 USC 252
note.

(2) the conditions which have caused are are causing such cost increases were, or are being experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

(b) Upon application under subsection (a) by a small business concern to terminate a fixed-price contract between an executive agency and such small business concern, the head of the executive agency may modify the terms of the contract in lieu of termination for the convenience of the Government only if he finds after review of the application that—

(9) a statement of any claims known or contemplated by the contractor against the Government involving the contract in question, other than those referred to under (8) above;

(10) an estimate of the contractor's total profit or loss under the contract if required to complete at the original contract price;

(11) an estimate of the total profits from other Government business, and all other sources, during the period from the date of the first contract involved to the latest estimated date of completion of any other contracts involved;

(12) balance sheets, certified by a certified public accountant, as of the end of the

contractor's fiscal year first preceding the date of the first contract, as of the end of each subsequent fiscal year, and as of the date of the request together with income statements for annual periods subsequent to the date of the first balance sheet; and

(13) a list of all salaries, bonuses, and all other forms of compensation of the principal officers or partners and of all dividends and other withdrawals, and all payments to stockholders in any form since the date of the first contract involved.

DELEGATION

Sec. 5. The head of each executive agency shall delegate authority conferred by this Act, to the extent practicable, to an appropriate level that will permit the expeditious processing of applications under this Act and to insure the uniformity of its application.

LIMITATIONS

Sec. 6. (a) The authority prescribed in section 4(a) shall apply only to contracts which have not been completely performed or otherwise terminated and which were entered into during the period from August 15, 1971, through October 31, 1974.

41 USC 252
note.

41 USC 252
note.

(b) The authority conferred by section 4(a) of this Act shall terminate September 30, 1976.

Approved December 31, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-154 (Comm. on Small Business) and No. 94-724 (Comm. of Conference).

SENATE REPORT No. 94-378 accompanying S. 1259 (Comm. on Government Operations).

CONGRESSIONAL RECORD, Vol. 121 (1975)

Apr. 22, considered and passed House.

Oct. 29, S. 1259 considered in Senate.

Oct. 30, considered and passed Senate, amended, in lieu of S. 1259.

Dec. 15, House agreed to conference report.

Dec. 17, Senate agreed to conference report.

89 STAT. 1097

(1)(a) the agency would reprocure the supplies or services in the event that the contract was terminated for the convenience of the Government; and

(b) the cost of terminating the contract for the convenience of the Government plus the cost of reprocurement would exceed the amount of the contract as modified; and

(2) Any such modification shall be made in compliance with cost comparison and compensation guidelines to be issued by the Administrator of the Office of Federal Procurement Policy. Such cost comparison and compensation guidelines shall be promulgated by the Administrator not later than 10 days after enactment of this Act.

(c) If a small business concern in performance of a fixed-price Government contract experiences or has experienced shortages of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby, and such shortages result in a delay in the performance of a contract, the head of the agency, or his designee, shall provide by modification to the contract for an appropriate extension of the contract delivery date or period of performance.

(d) A small business concern requesting relief under subsection (a) shall support that request with the following documentation and certification:

(1) a brief description of the contract, indicating the date of execution and of any

Request
for relief.

amendment thereto, the items being procured, the price and delivery schedule, and any revision thereof, and any other special contractual provision as may be relevant to the request:

(2) a history of performance indicating when work under the contract or commitment was begun, the progress made as of the date of the application, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion thereof;

(3) a statement of the factors which have caused the loss under the contract;

(4) a statement as to the course of events anticipated if the request is denied;

(5) a statement of payments received, payments due and payments yet to be received or to become due, including advance and progress payments, and amounts withheld by the Government, and information as to other obligations of the Government, if any, which are yet to be performed under the contract;

(6) a statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances and profit;

(7) a statement and evidence of the contractor's present estimate of total costs under the contract if enabled to complete, broken down between costs accrued to date of request, and runout costs, and as between costs

for which the contractor has made payment and those for which he is indebted at the time of the request;

(8) a statement and evidence of the contractor's estimate of the final price of the contract, giving effect to all escalation, changes, extras, and other comparable factors known or contemplated by the contractor;

89 STAT. 1096

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 397-96

NOV 11 1977

LLOYD WOOD CONSTRUCTION CO., INC.

v.

THE UNITED STATES

Olin W. Zeanah, attorney of record, for plaintiff. Wilbor J. Hust, Jr., and Zeanah, Donald and Hust, of counsel.

Anthony Thompson, with whom was Assistant Attorney General Barbara Allen Babcock, for defendant.

Before DAVIS, Judge, Presiding, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the court on defendant's motion to dismiss for lack of jurisdiction and for failure to state a claim

for which relief can be granted. Having considered the parties' written submissions, the court, without oral argument, grants defendant's motion.

Plaintiff entered into a fixed price contract on August 25, 1972, under which it agreed to construct 300 units of family housing for \$5,838,164. It alleges that the termination of wage-price controls caused a steep increase in construction costs, so that plaintiff lost \$911,342.65 as of December 31, 1975, by performing the contract. It is plaintiff's contention that the passage of the Small Business Emergency Relief Act, Pub. L. 94-190, 89 Stat. 1095 (1975), entitled it to be reimbursed by the Government for the losses suffered. Such a claim was made to the contracting officer on the construction contract. He denied the claim on June 28, 1976. This determination was affirmed by the Acting Division Engineer of the Army Corps of Engineers on September 24, 1975. Five days later, this suit was filed.

No provision in the contract conferred upon plaintiff any entitlement to relief for expenses exceeding the fixed price stated in the contract.¹ No constitutional obligation creates such entitlement either. Therefore, plaintiff can establish jurisdiction only if the statute, expressly or by fair impli-

1. Plaintiff's claim for reformation, revision, and modification of the contract lacks merit. Plaintiff argues that the parties did not intend that plaintiff would lose money on the contract. Yet no reason has been advanced why the court should ignore the fixed-price nature of the contract, which clearly evidences a mutual intent that the risk of increasing expenses should be borne by the contractor. As in *Tony Downs Foods Co. v. United States*, 209 Ct. Cl. 31, 42, 530 F.2d 367, 373 (1976), plaintiff's "mistaken judgment as to economic conditions, and the continued existence of the price freeze, [is] a mistake for which relief cannot be granted."

cation, creates an entitlement to monetary relief. See *United States v. Testan*, 424 U.S. 392 (1976); *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967). We find no evidence that the statute creates any entitlement to monetary relief.

The legislation invoked by plaintiff was enacted "to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns have suffered or can be expected to suffer serious financial loss because of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs." Sec. 2, Pub. L. 94-190. Plaintiff, arguing that the legislation was designed to apply to situations just like the one in which it found itself, contends the law required that it be given assistance in the amount of its contract losses. Two flaws, each fatal in itself, mar plaintiff's analysis.

First, the Act does not authorize monetary awards to every contractor whose performance has been more expensive than the agreed contract price. Instead, the Act authorizes only limited remedies under specific circumstances. Subsection 4(a) allows agency heads, upon the application of small business concerns, to terminate contracts for the convenience of the Government upon certain findings. Subsection 4(c) provides for the extension of performance timetables necessitated by shortages of energy supplies. Only subsection 4(b) even permits, much less requires, the payment of moneys beyond amounts specified by contract. It authorizes agency heads to modify terms of certain contracts. But the benefits of subsection 4(b), like those of subsection 4(c), are limited to contractors who request termination for the convenience of the Government.

and they may only be attained where the contract modification complies with guidelines from the Office of Federal Procurement Policy. Those guidelines direct that relief be "limited to those small business firms whose overall financial position is so poor that their ability to survive, without relief under the Act, is in question." The determination by the Acting Division Engineer that plaintiff did not meet this standard has not been challenged here.

Even if the Act contemplated monetary relief in situations such as plaintiff's, a second hurdle would block plaintiff's path to recovery. That is, whatever relief the Act authorizes is permissive, not mandatory. Being a small business with the problems sought to be remedied by the Act does not suffice to establish entitlement to relief. Instead, the statute and its legislative history make it clear that no relief, other than extension of contract timetables, can be had without a prior determination by the head of an agency that such relief is appropriate. In short, the relief contemplated by the Act is discretionary with the agency. This is evident from the language of the statute itself which provides that "the head of *** [an] agency *may* modify the terms of the contract***." Subsec. 4(b). [Emphasis supplied.] The plain meaning of this language is made wholly unambiguous by the alternative language chosen in subsection 4(c), which provides that where energy shortages cause delay in the performance of a contract "the head of *** [an] agency, or his designee, *shall* provide by modification to the contract for an appropriate extension * * *." [Emphasis supplied.]

The legislative history of the Act reinforces our conclusion that the choice to leave monetary relief discretionary with the agency was deliberate. The House Report explaining the bill stated: "Legislation is needed to

enable the Government agencies to grant relief *at their discretion* to eligible small business fixed-price contractors." [Emphasis supplied.] H.R. REP. NO. 94-154, 94th Cong., 1st Sess., 1975 U.S. CODE CONG. & AD. NEWS 2198. The Report continued: "*The bill would not require that the executive agency provide any relief but would merely authorize the head of the agency to either terminate the contract for the convenience of the Government without cost to the contractor or to modify the terms of a fixed-price contract, i.e., to grant a price increase***.*" [Emphasis supplied.] *Id.* at 2199. This legislative history reinforces the unambiguous language of the statute, leaving no doubt that a small business concern has no *entitlement* to monetary relief of the sort required to establish jurisdiction under the *Eastport* and *Testan* cases, cited above. The only conceivable grounds for a contrary decision in view of the foregoing would be a showing that the contracting officer's determination was illegal because it was arbitrary or capricious or in violation of some applicable statute or regulation. Plaintiff has pleaded nothing to show that is the situation here.

Plaintiff thus does not have a claim for monetary relief within this court's jurisdiction and fails to state a claim on which relief can be granted.

IT IS THEREFORE ORDERED AND CONCLUDED that defendant's motion to dismiss the claim for lack of jurisdiction is granted, and plaintiff's petition is dismissed.

NOV 11 1977

BY THE COURT

Oscar H. Davis
Judge, Presiding

IN THE UNITED STATES COURT OF CLAIMS
 NO. 397-76
 LLOYD WOOD CONSTRUCTION CO., INC.

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG and
 BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiff's motion, filed December 1, 1977, pursuant to Rule 151, for rehearing, wherein plaintiff requests that the court revise and reverse its decision in the order entered November 11, 1977, dismissing plaintiff's petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

JAN 13 1978

Oscar H. Davis
 Judge, Presiding

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
 OFFICE OF MANAGEMENT AND BUDGET
 WASHINGTON, D.C. 20303

January 9, 1976

TO THE HEADS OF EXECUTIVE
 DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Guidelines for Implementation of the Small
 Business Emergency Relief Act, Public Law
 94-190

The Small Business Emergency Relief Act (hereinafter referred to as "the Act"), P.L. 94-190, provides for relief to small business concerns holding fixed-price Government contracts awarded during the period August 15, 1971, through October 31, 1974, which have not been completely performed or otherwise terminated as of December 31, 1975. Relief may be available in cases where such concerns have suffered or can be expected to suffer serious financial loss as a result of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs. The fact that a contract could have been completed prior to December 31, 1975, but was not, is itself no bar to relief under the Act.

The following guidelines, issued as required by the Act, and pursuant to the additional authority of Public Law 93-400, 41 U.S.C. 401, are to be followed by executive agencies in implementation of the Act.

1. *Period during which authority may be exercised.*
 Authority to issue a termination notice under Section 4(a)

of the Act, or to execute a modification under Section 4(b) of the Act, extends from the date of the Act, December 31, 1975, through September 30, 1976. A termination settlement agreement entered into under this authority need not be executed by September 30, 1976, but should be executed as soon as possible after issuance of the termination notice.

2. *Basis of decision.* Relief under the Act is at the discretion of the executive agencies. The decision as to whether a contractor is entitled to relief under the Act must be based upon an evaluation of the contractor's overall financial position and the factors leading to that position. A showing of financial loss under a particular contract, even if resulting from the energy crisis or rapid and unexpected cost escalations, is itself not sufficient to justify relief under that contract. Relief should be limited to those small business firms whose overall financial position is so poor that their ability to survive, without relief under the Act, is in question. The decision of the agency head or his designee as to whether a contractor is entitled to relief under the Act, and whether such relief is to be effected by contract termination or contract modification, shall not be subject to the disputes clause of the contract.

3. *Termination procedures.* Termination and settlement procedures shall be in accordance with the "Termination for Convenience of the Government" clause of the contract.

4. *Modification of the contract in lieu of termination.* When proceeding under Section 4(b) of the Act, the agency head or his designee shall estimate the amount which would be paid to the contractor in settlement of a termination claim, including an estimate of the contractor's settlement

costs as provided in the "Termination for Convenience of the Government" clause. He shall also estimate the price the Government would have to pay to reprocure—from a different contractor—the supplies or services not yet delivered or performed, or substantially similar supplies or services, if the contract in question were terminated. Administrative costs to the Government of reprocurement shall be estimated to the extent feasible, and added to the estimated reprocurement price. Procedures for estimating costs shall be in accordance with applicable agency regulations, to the extent practicable, taking into account all data reasonably available within the time period set by the Act. If the agency head or his designee determines that the contractor could satisfactorily provide the undelivered supplies or services under modified contract terms at a negotiated price which is less than the sum of the estimated termination settlement amount, the estimated reprocurement price of the supplies or services still required, and the estimated administrative costs of reprocurement, the contract may be modified.

5. *Notice to small business concerns.* Agencies shall make reasonable efforts to ensure that small business concerns which might be affected are promptly made aware of the application procedures and documentation requirements of the Act, in order that adequately documented applications may be evaluated and acted on by September 30, 1976. Contractors should be made aware that the Act does not permit recovery of more than the contract price for materials delivered or services performed prior to contract termination or modification.

6. *Definition of small business concern.* For purposes of these guidelines, a small business concern is a concern

which was a small business, as defined in the Act, at the time of award of a contract under which relief is sought.

Hugh E. Witt
Administrator for Federal
Procurement Policy

APPENDIX D

DEPARTMENT OF THE ARMY
SAVANNAH DISTRICT, CORPS OF ENGINEERS
P.O. BOX 889
SAVANNAH, GEORGIA 31402

SASOC

28 June 1976

Lloyd Wood Construction Co., Inc.
P.O. Drawer 21
Tuscaloosa, AL 35401

Re: Contract No. DACA21-73-C-0021, Request for
Relief Under Small Business Emergency Relief Act
(P.L. 94-190)

Gentlemen:

As successor Contracting Officer on the subject contract, I have carefully reviewed your claim for relief under Public Law 94-190.

My findings from the information you have provided to date are as follows:

- a. The financial condition of your company appears to be basically sound, and your company does not appear to be in danger of failing if relief is not granted under this Act.
- b. Losses which you suffered in the performance of the contract appear to be the result of factors other than rapid and unexpected increases in construction costs or the energy crisis.

Based upon this review, I do not find justification for modifying (or terminating) your contract. However, if you wish to submit additional information as requested on 8 June 1976, and to meet with me and discuss your request, I shall be happy to do so. If you wish to meet, please call Mr. Fowler, my District Counsel, or his assistant, Mrs. Westbrook, for coordinating a mutually convenient date. If I do not hear from you further, I shall consider the matter closed.

Sincerely,

FRANK WALTER
Colonel, Corps of Engineers
Contracting Officer

APPENDIX E
DEPARTMENT OF THE ARMY
South Atlantic Division, Corps of Engineers
510 Title Building, 30 Pryor Street, S.W.
Atlanta, Georgia 30303

SADOC

24 September 1976

Lloyd Wood Construction Company, Inc.
P.O. Drawer 21
Tuscaloosa, Alabama 35401

Re: Request for Relief Under P.L. 94-190
(Small Business Emergency Relief Act)
Lloyd Wood Construction Company, Inc.
Contract No. DACA21-73-C-0021

Gentlemen:

After careful review of the evidence submitted in this matter, including facts presented by you at the conference in this office, I am convinced that the denial of your request by COL Frank Walter is proper.

This opinion is based on the fact that Public Law 94-190 does not permit reimbursement of losses already incurred but instead permits the Government to terminate contracts which have not been completely performed, or in the alternative, to modify such contracts by adjustment of the price for work not yet performed so that future losses can be minimized. Modification is permitted if reprocurement is contemplated and the cost of such reprocurement plus the cost of termination would exceed the cost of modification. In cases such as yours, where the work was completed prior

to the filing of this claim, there is no work remaining which could be terminated or modified.

Section 5 of the Act provides that the head of each executive agency shall delegate the authority thereby to the extent practicable to permit expeditious processing of applications. A copy of the delegation is inclosed. Paragraph 3 of the delegation sets out the procedure to be followed in terminating contracts, and Paragraph 4 explains the procedure for modification. Paragraph 5 reiterates that "the Act does not permit recovery of more than the contract price for materials delivered or services performed prior to contract termination or modification."

Under these conditions I do not believe Public Law 94-190 gives me any authority to reverse the decision of the District Engineer.

I have made no determination as to the extent of your losses or the cause or causes therefor. Since the law does not permit me to compensate you for such losses an evaluation is not necessary.

This decision completes administrative consideration of your claim.

Sincerely yours,

I Incl.
As stated

DANIEL D. HALL
Colonel, Corps of Engineers
Acting Division Engineer

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No. 77-1457

Supreme Court, U.S.
RILED

JUN 19 1978

MICHAEL J. SISK, CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1977

LLOYD WOOD CONSTRUCTION COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

On August 25, 1972, petitioner was awarded a federal contract to design and construct 300 units of family housing at Ft. Jackson, South Carolina, for \$5,838,164 (Pet. App. 2b). Petitioner contends that it suffered a loss of \$911,342.65 because of increases in prices for materials and services through December 31, 1975 (*ibid.*). It brought this suit in the Court of Claims, contending that it was entitled to recover this sum under the Small Business Emergency Relief Act, 89 Stat. 1095, 41 U.S.C. (Supp. V) 252 note.¹

¹The Act is confusingly reproduced in the petition. The portions of the statute at Pet. App. 6a-8a should have appeared at Pet. App. 3a, following paragraph (b) and preceding subparagraph (9).

There is no reason for the Court to grant review. Because the Act expired on September 30, 1976 (see Section 6(b); Pet. App. 5a), the case does not present any issue of continuing importance. Moreover, the decision of the Court of Claims is correct.

The court held that petitioner had failed to state a claim on which relief could be granted for two reasons. First, only Section 4(b) of the Act authorizes the award of money to small contractors, and, under that provision, the award must be in accordance with regulations. The regulations limited monetary relief to firms whose overall position was so poor that their ability to survive without relief would be open to question, and the Court of Claims held that petitioner could not qualify for relief in light of that regulation (Pet. App. 3b-4b). Second, the Act and its legislative history provide that executive agencies "may" grant monetary relief; because the statute creates discretion on the part of the executive branch, and because that discretion had been exercised against petitioner, there is no legal right to recover money (Pet. App. 4b-5b). See also *United States v. Testan*, 424 U.S. 392.

The express terms of the Act give discretion to executive agencies to decide whether to grant monetary relief to small businesses. Section 4(b) provides that "the head of the executive agency *may* modify the terms of the contract" (see Pet. App. 3a). The legislative history of the Act, which is recited by the Court of Claims (*id.* at 4b-5b), confirms that the statutory remedy is entirely discretionary. See, e.g., H.R. Rep. No. 94-154, 94th Cong., 1st Sess. 4 (1975) ("The bill would not require that the executive agency provide any relief but would merely authorize the head of the agency to either terminate the contract *** or *** grant a price increase"). Because the remedy is discretionary, there is no statute affirmatively requiring the payment of money, and the Court of

Claims had no authority to grant relief. See *United States v. Testan, supra*. Moreover, the administrative guidelines to which petitioner objects simply stated how the executive discretion would be exercised—that is, the guidelines stated that discretion would be exercised in favor of granting a price increase only if the denial of an increase would imperil the survival of the small business.² Petitioner does not contend that it was entitled to relief under the guidelines, and, consequently, it has not established that the contracting officer of his supervisor acted arbitrarily or capriciously.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

²Petitioner's objection to the guidelines (Pet. 5) depends on its argument that the Act leaves no discretion to the executive agencies. We do not understand petitioner to argue that, if there is some discretion, the guidelines are an impermissible formulation of a principle for the exercise of that discretion. Petitioner's further argument (Pet. 6-7) that the contracting officer refused to exercise any discretion because he deemed himself bound by the guidelines misses the point that the criteria established by the guidelines structure and guide the exercise of discretion; in other words, discretion was exercised in favor of corporations that met the criteria of the guidelines. The guidelines enabled ranking officials of the agency to establish criteria under which lower officials would grant relief in particular cases.